BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

CHARLES CONGER	)	
Claimant	)	
	)	
VS.	)	
	)	
DZ CAB LINE / ZANE BROWN	)	
Respondent	)	Docket No. 1,020,856
	)	
AND	)	
	)	
KANSAS WORKERS COMPENSATION FUND	)	
Insurance Carrier	)	

ORDER

Claimant requests review of the May 3, 2006 preliminary hearing Order entered by Administrative Law Judge Brad E. Avery.

ISSUES

The Administrative Law Judge (ALJ) found claimant failed to file a written claim within the statutory time period. He also concluded respondent was not estopped from utilizing the timely written claim defense as claimant did not demonstrate any reliance upon the purported statements made by his employer in the hours after claimant's accident. Thus, claimant was denied the workers compensation benefits he sought.

The claimant requests review of this decision alleging that while he did not file a written claim for compensation within either the 200 days or one year period prescribed by statute, his claim is nonetheless timely as respondent represented to him that the medical bills incurred in association with his work-related accident would be taken care of. Thus, the ALJ erred in refusing to find claimant's assertion of his claim as timely.

The respondent's owner, Zane Brown, appeared pro se and offers no legal argument in support of his position as employer in this matter.

The Kansas Workers Compensation Fund (Fund) asserts the preliminary hearing Order should be affirmed in all respects.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, the Board makes the following findings of fact and conclusions of law:

There is no dispute, at least for preliminary hearing purposes, that claimant was injured in a motor vehicle accident on July 9, 2003 while in the course and scope of his employment for respondent. Claimant was a taxi cab driver and while parked in a parking area, was struck by another car and injured. Zane Brown, the owner of the cab company, was notified and took claimant to the hospital. According to claimant, Mr. Brown told him that "work comp" was going to take care of his hospital bill.[1] Claimant's wife also testified that Mr. Brown assured her that everything would be taken care of and not to worry.[2]

Mr. Brown did not have workers compensation insurance, but did have automobile insurance. And while the hospital bill was not immediately paid, the automobile insurer apparently paid the bill sometime in 2005.

Claimant was treated at the hospital and told to follow-up with his primary care physician in one or two days. He was also told to stay home from work for two days and then he was free to return to work. Since this ER visit, claimant did not follow-up with his primary care physician. Over the course of the next year and a half, claimant had other medical issues which required attention but none of those involved his left hip, lower back and left knee. When asked why he sought no treatment during this period, claimant explained that ". . . there was no guarantee that anybody's going to pay my medical bills and I didn't have the money to pay them."[3]

There was a third party action filed in claimant's name for some of the damages attributable to the accident. These damages included the property damage to Mr. Brown's vehicle (used as the cab) and the hospital bill Mr. Brown represented to the Court that he was responsible to pay. At some point claimant became a named party to that action and

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[1] P.H. Trans. at 14.

[2] *Id.* at 87-88.

[3] *Id.* at 61.

then claimant took control of the litigation, choosing to dismiss his claim and re-file it sometime thereafter.[4]

From July 10, 2003 to May, 2005, claimant was employed by a variety of employers, including a construction company that builds bridges, a carpet cleaning company and a construction company that installed roofs on hay barns. He did not, however, seek treatment for his hip, back or knee complaints.

On May 5, 2005, approximately a month before he re-filed his personal injury claim against the alleged tortfeasor who was involved in the accident, claimant went to Flint Hills Community Health Center for a general physical exam. There was a complaint regarding claimant's back pain and depression. Then on May 27, 2005, claimant alleges he sustained a back injury while lifting a steel I-beam for his employer, Kenco.

Claimant was referred to see Dr. Pat Do. Dr. Do treated the claimant for a mild annular bulge of the disc at L4-5 and myofascial pain. Dr. Do's records do not indicate any sort of injury on May 27, 2005. To the contrary, it appears from Dr. Do's records that claimant suggested that his back complaints did not increase in spite of his work activities in May. It does not appear that Dr. Do was advised of claimant's work activities since July 9, 2003. Claimant's counsel wrote to Dr. Do and asked whether his present back complaints were attributable to the July 9, 2003 accident or to his work activities in May 2005. Dr. Do's office notes indicate he attributes claimant's back complaints to the motor vehicle accident in 2003.[5]

The ALJ concluded claimant failed to file a timely written claim under K.S.A. 44-520a. The written claim statute, K.S.A. 44-520a, provides in part:

> (a) No proceedings for compensation shall be maintainable under the workmen's compensation act unless a written claim for compensation shall be served upon the employer by delivering such written claim to him or his duly authorized agent, or by delivering such written claim to him by registered or certified mail within two hundred (200) days after the date of the accident, or in cases where compensation payments have been suspended within two hundred (200) days after the date of the last payment of compensation; or within one (1) year after the death of the injured employee if death results from the injury within five (5) years after the date of such accident.

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[4] According to claimant, he was dissatisfied with the representation he was receiving in that action and elected to dismiss and re-file the claim with the assistance of Mr. Helbert, his counsel in this matter. Although it is not expressly stated in this record, it appears that the lawyer in that first action was retained by Mr. Brown and not the claimant.

[5] P.H. Trans, Cl. Ex. 1 (Dr. Do's records/office notes).

There is no dispute that respondent did not file any accident report as required by statute. Thus, in order to be timely, claimant must have served his written claim within a year of July 9, 2003. He did not. His Application for Hearing was filed on December 27, 2004 and his lawyer served a written demand just a few days before that. Neither of those documents is, under the statute, timely.

Rather, claimant maintains that equitable estoppel extends the period in which he has to assert his claim. In essence, he argues that his employer represented that "work comp" would take care of his hospital bills. And that by relying upon that representation, respondent is equitably estopped from asserting the timely written claim defense.

While the ALJ acknowledged the theory, he rejected it in this instance. He reasoned that -

> One who asserts an estoppel must show some change in position in reliance on the adversary's misleading statement. . . [citations omitted]. The court finds claimant did not rely upon the statements made to him by the employer in regard to the furnishing of medical treatment. Claimant was told he could follow up with his family doctor. However he never did so. Claimant saw a doctor on his own volition in May of 2005, nearly two years after the accident. The estoppel argument is not applicable.[6]

He also went on to find that respondent had no duty to disabuse claimant of his right to treatment.[7] According to the ALJ, claimant was not seeking any further treatment beyond the initial hospital visit and only after a year and a half, did he seek treatment for those injuries. It appears that the ALJ concluded that the claim was extinguished as of July 9, 2004, and that claimant's subsequent efforts at seeking treatment did not revive his otherwise stale claim.[8]

The Board has considered the ALJ's findings and affirms. The Board agrees with the ALJ's analysis regarding the timeliness of claimant's claim. And likewise with his analysis regarding equitable estoppel. There is no evidence in this file that claimant relied upon Mr. Brown's representations with respect to his medical care. He sought no care from July 9, 2003 to May 2005 and filed no claim in that period. Moreover, he has gone on to perform construction work which has, by his own admission, caused him additional injury. And while Dr. Do has attributed his present complaints to a motor vehicle accident in 2003, it is wholly unclear that Dr. Do had an accurate picture of claimant's intervening

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[6] ALJ Order (May 3, 2006) at 2.

[7] *Id.* at 2; citing *Blake v. Hutchinson Manufacturing Co.*, 213 Kan. 511, 516 P.2d 1008 (1973).

[8] See *Rutledge v. Sandlin*, 181 Kan. 369, 310 P.2d 950 (1957).

work activities or the precipitating event that caused claimant to seek treatment in May of 2005. Accordingly, the ALJ's preliminary hearing Order is affirmed.

As provided by the Act, preliminary hearing findings are not binding but subject to modification upon a full hearing on the claim.[9]

WHEREFORE, it is the finding, decision and order of the Board that the Order of Administrative Law Judge Brad E. Avery dated May 3, 2006, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of June, 2006.

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BOARD MEMBER

c: Michael C. Helbert, Attorney for Claimant
DZ Cab Line c/o Zane Brown, Respondent
Darin M. Conklin, Attorney for the Fund
Brad E. Avery, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director

[9] K.S.A. 44-534a(a)(2).